CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT

OPELOUSAS,

IN

JULY, 1884.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ,* *Chief Justice.*

Hon. FÉLIX P. POCHÉ,
Hon. ROBERT B. TODD,*
Hon. THOMAS C. MANNING,
Hon. CHARLES E. FENNER,
} *Associate Justices.*

No. 1210.

THE STATE OF LOUISIANA EX REL. JULES MESTAYER VS. CONRAD DEBAILLON, JUDGE TWENTY-FIFTH JUDICIAL DISTRICT.

An order of a presiding judge recusing himself in a cause on the ground of interest, and appointing the judge of an adjoining court to try the cause, is not vacated or revoked by the fact that the successor of the said presiding judge has in the meantime been commissioned and inducted into office.

The order of recusation, if not void *ab initio* on its face, cannot be attacked collaterally, and remains in full force until rescinded or revoked by a direct order from competent authority.

Under Section 1425, Revised Statutes, a speedy trial is imperatively required in all contested elections. If the suit cannot be tried, owing to physical or legal impossibility, at the next regular term of the court, a special term must be ordered.

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State ex rel. Mestayer vs. Debaillon, Judge.

A mandamus will lie to compel the judge, even if he be only appointed under a recusation of the judge of the court, to order a special term and to try the case without unnecessary delay.

An appeal does not lie from an order dissolving on bond an injunction in a contested election case.

APPLICATION for Mandamus.

Edward Simon and *Breaux & Hall* for the Relator.

C. Debaillon in pro. per.

The opinion of the Court was delivered by

POCHÉ, J. Relator seeks to compel the respondent judge to try a cause in which he is plaintiff, and to compel the judge to grant him a suspensive appeal from an order dissolving on bond a writ of injunction which had previously been issued at his instance in the same suit.

The record shows the following proceedings and incidents bearing on the issues involved in the pleadings:

On the 10th of May, 1884, relator filed a suit contesting the election of P. A. Veazie as sheriff of the parish of Iberia.

On the 21st of the same month the judge presiding over the Twenty-first Judicial District Court of Iberia, in which the suit had been filed, entered an order recusing himself on the ground of interest, and appointing respondent, a judge of an adjoining district, for the trial of the cause.

In justification of his refusal to perform the acts required of him, the respondent judge urges the following reasons:

1. That the order of Judge Fontelieu recusing himself and appointing respondent as the judge of the case has since been vacated by the fact that his successor in office, Judge Gates, has since been commissioned and inducted into office.

2. That a regular term of the Twenty-first Judicial District Court for the parish of Iberia having begun on May 12, and ended on the 24th of the same month, respondent has no legal authority to order a special term for the trial of said cause as conditionally authorized by section 1425 of the Revised Statutes of 1870; and that he has no authority to order such a term under the recusation act, being Act No. 40 of 1880.

3. That relator is not entitled to a suspensive appeal from the decree dissolving his injunction on bond, for the reason that said order cannot work an irreparable injury to the relator.

First—The whole controversy pivots on the judge's first objection; for if he has been divested of authority to try the cause, he has no more

official connection with it, and he has therefore been stripped of all control over the matters in contest.

His proposition involves two questions:

1. That Judge Gates has been duly elected, qualified and inducted into office as the successor of Judge Fontelieu.

2. That by the mere operation of that fact, Judge Fontelieu's order of recusation has been vacated or revoked.

On the first point, the record discloses the fact that a suit is now pending in which the election of Judge Gates is contested by the former incumbent, Judge Fontelieu; and that the former is now the appellant before this Court from an order enjoining him from qualifying as judge under the commission which was issued to him by the Governor.

The conclusion that he is now in legal possession of the office is at least premature. And as he, as well as his opponent, are not parties to this proceeding, it stands to reason that the fact cannot now be judicially ascertained or announced. We shall therefore carefully, as we must in justice, refrain from any expression of opinion as to the legal status of Judge Gates in connection with the office to which he has been commissioned.

As it cannot at this stage of the proceedings be judicially asserted that he is in the lawful possession of the office, we might be justified in abiding by the negative of the question, and to thus dispose of that reason. Bnt we think it wiser to follow the opposite course and to concede, for the sake of argument, that Judge Gates is now and has been the lawful judge of that district since the 22d of May last past.

This leads us to the consideration of the proposition asserted by respondent, that the order of recusation has thereby been vacated, and that he has no more authority in the premises.

It is not pretended or even intimated that the order of recusation was not perfectly legal and binding at the time that it was issued. It therefore follows, and it is virtually conceded, that under its effect the respondent became vested with jurisdiction over the cause as absolutely and as exclusively as would have been the case with a suit originating in his own court.

The jurisdiction thus acquired under and by virtue of a judicial order must attach and continue until it has been destroyed or divested by equally competent authority in a direct order, not by inference or even by collateral proceedings. No principle of law has received greater and more frequent sanction, or is more deeply imbedded in our

jurisprudence, than that which forbids a collateral attack on a judgment or order of a competent tribunal, not void on its face *ab initio*.

The rule has been frequently applied to orders and decrees issued *ex parte*. Duson, curator, vs. Dupre *et al.*, 32 Ann. 896, and authorities therein cited.

Now, in this case it is not even alleged that the order of recusation has ever been revoked or otherwise vacated by any competent authority, not even by Judge Gates himself. It is therefore yet in full force, and under it respondent continues to be vested with exclusive jurisdiction over the cause, until stripped of his authority in a legal manner.

Second—The next question is, whether the relator has been legally deprived of his right to a speedy trial of his contest suit.

The record does show that a regular term of the court began on the 12th and ended on the 24th of May. But it also appears that when the court adjourned the case was not yet at issue, and to this day the defendant has not yet filed his answer.

Section 1425, Revised Statutes, provides in substance that the trial of contested elections shall be proceeded with at any regular term of the court; but that if no regular term of the court is to be held within five weeks from the time of filing the petition of the contestant, a special term shall be holden on the third Monday after the day on which the election for the office contested was held.

The spirit and object of that law, as well as of the other provisions regulating the trials of contested election cases, are directed to securing speedy trial of all such cases in which the interest of the people is almost as great as that of the parties directly interested in the suit.

Respondent's contention is that as a regular term of the court was to be held within five weeks from the day on which the petition of contest was filed, the contingency of a special term could not occur, and that relator having allowed the adjournment of the court before insisting on a trial, has lost his recourse for a special term, and he must wait for nine months for a trial under the provisions of section 4 of act 40 of 1880. A reference to that law shows that it applies to general recusation cases, and hence it cannot militate against a special law which imperatively requires a speedy trial of all contested election cases. Hence it has no bearing on the point now under discussion.

It is too plain for argument that relator had no control over the then presiding judge of the court touching an adjournment of the term, nor could he control the defendant as to the time of filing his answer to the suit. Hence it follows that the unpropitious adjournment of the court

before issue was joined in his case cannot be attributed to his fault or to his laches. The bounden duty of the respondent under the law was to proceed to the court as soon as he was notified of his appointment and to try the case if the court was yet in session. If he found the court adjourned, it was then his duty to order a special term. We hold that the regular term to be held in five weeks, referred to in section 1425, Revised Statutes, is a term at which the case could be tried, and not a term at which it was a physical as well as a legal impossibility to secure a trial. Bearing in mind that the great and primary object of that legislation is to secure a speedy trial of that class of cases, we hold that the term which began on the 12th of May was not such a regular term as the law contemplates. Hence, the necessity for a special term did occur, and it should have been ordered. But as it was not ordered, and a literal compliance with the requirements of the statute has thus been rendered impossible, can the relator be thereby defeated of his rights to, and the spirit of the law thwarted in its imperative requirement of a speedy trial of the cause? Evidently not. Hence we conclude that a special term should be ordered, and we shall so decree.

Third—As to the other relief which relator craves at our hands, we think that he is not entitled to the same. If his opponent, under the effect of the dissolution of the injunction which was intended to restrain his induction into the office of Sheriff, has proceeded to qualify and to assume the functions of the office, relator will have his recourse against him under the bond of dissolution; if he has not qualified, and the former incumbent has continued in office, the defendant in injunction will be liable to relator for all damages and for the emoluments of which the relator will have been deprived in the meantime. Hence, the injury which he may sustain is not irreparable, therefore he is not entitled to an appeal. State *ex rel* Pflug vs. Judge, 35 Ann. 765.

On this branch of the case the mandamus must therefore be declined.

It is therefore ordered that the alternative writ of mandamus herein issued, ordering the Judge of the Twenty-fifth Judicial District to order a special term of the Twenty-first Judicial District Court in and for the parish of Iberia, for the trial of the case of Jules Mestayer vs. P. A. Veazie, be made peremptory; and it is further ordered that Conrad Debaillon, judge of said Twenty-fifth Judicial District, do order such special term at the earliest date which may be consistent with his duties in his own district, and that at the time thus fixed he proceed to the trial of said cause according to law; and that he pay all costs of these proceedings.

No. 1221.

THEODORE FONTELIEU VS. F. S. GATES.

An appeal does not lie from an order granting an injunction unless the injury complained of is irreparable.

APPEAL from the Twenty-first District Court, Parish of Iberia. ——, judge *ad hoc*.

Edward Simon and *Breaux & Hall* for Plaintiff and Appellee.

Fred. Gates, pro. per.

The opinion of the Court was delivered by

MANNING, J. This case comes up on an intermediate issue presented in a contest for a judgeship. The two parties were rival candidates for that office in the Iberia-St. Martin district. The plaintiff's allegation is that the returning officer had fraudulently returned the defendant as elected, and after setting forth *in extenso* the grounds in support of that allegation, prays that he, the plaintiff, be adjudged to have been elected. His petition was filed May 16th., the election having been held on the 22d. of the previous month. Fontelieu had been judge of that district the preceding term. He recused himself and appointed a judge of an adjoining district to try the case.

On May 28th. the plaintiff filed a supplemental petition, alleging that the Governor had in the interim commissioned Gates, and prayed an injunction restraining and forbidding him from exercising the functions of the judgeship. The judge *ad hoc* granted the injunction the same day, and on June 7th. Gates obtained a suspensive appeal therefrom. That is the appeal before us.

Fontelieu moves to dismiss on the ground that no appeal lies from an order granting an injunction.

That is the settled rule; the only qualification of it being in those cases where the injury cannot be repaired in damages. Now so far as the defendant is personally concerned, any injury he may sustain is reparable, and therefore his appeal falls within the rule. State *ex rel.* Doullert v. Judge, 29 Ann. 869.

But the defendant urges that we shall consider and apply another legal principle, which he maintains is equally well-settled, viz that a judge cannot be enjoined from exercising the functions of his office.

We have no occasion now to pronounce an opinion upon that question. The mode by which this case has reached us is by appeal, and

an appeal does not lie from such order as is therein complained of. The appeal therefore cannot be heard.

Appeal dismissed.

No. 1216.

MRS. LAURA MALLARD, WIDOW, ET AL. VS. THOMAS C. ANDERSON ET AL.

Under Section 2387 of the Revised Statutes of the United States, the entry of lands authorized to be made by the corporate authorities of towns "in trust for the several use and benefit of the occupants thereof," is made for the benefit of such occupants, and the title received is, in effect, the title of the occupants. Judicial and special mortgages granted by said occupants prior to the discovery of their defective title attach to the lands immediately on the entry. Where proceedings are in progress to enforce such mortgages, transfer by the occupant to a third person is unlawful under Act No. 3 of 1878, and cannot sustain a conveyance by the corporate authorities to such transferree, whose title will be annulled at suit of the occupant's mortgage creditors.

APPEAL from the Twenty-fifth District Court, Parish of St. Landry. *Debaillon*, J.

K. Baillio for Plaintiffs and Appellees.

Perrodin & DuRoy for Defendants and Appellants.

The opinion of the Court was delivered by

FENNER, J. Plaintiffs are creditors of Thomas C. Anderson by judgment rendered in 1875 and recorded in this parish in 1877. In execution of this judgment they seized a certain immovable, designated as Lot No. 5 in the town of Washington, and on failure of the offering for cash, the same was adjudicated, on twelve months' credit, to Anderson, the judgment debtor, for $3850, who furnished his twelve months' bond importing special mortgage and vendor's privilege on the property. Various attempts to enforce this bond were thwarted by successive injunctions until, in February, 1882, plaintiffs sued out their last *fi. fa.*, under which the property was again seized. New injunctions were taken out, which were in due course dissolved.

The lot in controversy had been held by Anderson under title supposed to be valid, dating back to 1849.

In the year 1882, however, it was discovered that a certain portion of the town of Washington, including this lot, had never been validly severed from the public domain and still belonged to the United States.

Such a contingency seems to have been not without precedent, and Congress had provided means for the protection of occupants of such property and the perfection of their titles by sections 2387 and 2391 of the United States Revised Statutes, which are as follows:

"Sec. 2387. Whenever any portion of the public lands have been or may be settled upon and occupied as a town site, not subject to entry under the agricultural preëmption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or territory in which the same may be situated."

Section 2391, almost immediately following, reads thus:

"Any acts of the trustees not made in conformity to the regulations alluded to in section 2387, shall be void."

Acting in virtue of this statute, the corporate authorities of the town of Washington, through their mayor, William Curley, caused the said property to be entered at the proper land office and at the *minimum* price, "for the several use and benefit of the occupants thereof," and on the 20th day of April, 1883, received a certificate or receipt evidencing entry and title. It was found that the proportion of cost due by lot No. 5 was fifteen dollars and, on payment of this sum, the mayor stood ready to convey the title to the occupant thereof.

The vision of an opportunity to slip this property out of the hands of his pursuing creditors immediately presented itself to Anderson, and on April 23, 1883, he executed an act of sale of the property to Frank G. Ulrick for two thousand dollars, payable entirely in notes falling due respectively on January 1st, 1884, and January 1st, 1885. Armed with this act of sale, Ulrick demanded title from Curley, mayor, who executed the same on paymant of the fifteen dollars above alluded to.

On the discovery of these proceedings, plaintiffs instituted the present action, the objects of which are:

1. To have the conveyances from Anderson to Ulrick and from the mayor to Ulrick decreed to be null.

2. To have the registry of said sales and resultant mortgages erased from the conveyance and mortgage books of the parish.

3. To compel the mayor to receive the sum due from Anderson and thereafter to execute a transfer in favor of their debtor Anderson.

From a judgment in favor of plaintiffs, as prayed for, Ulrick alone has appealed.

We are perfectly clear upon the following propositions:

1. That under the provisions of section 2387 United States Revised Statutes, the entry of this land by the mayor, Curley, was made as the trustee and for the exclusive benefit of Anderson, that he held the title in trust for Anderson, and that his title was, in effect, the title of Anderson, subject to the duty of paying his ratable portion of the cost of entry.

From this it follows that, conceding the nullity of Anderson's prior title, the property fell at once under the judicial mortgage of plaintiffs, and also, by the effect of Art. 3304 Rev. C. C., under their special mortgage resulting from the twelve months' bond.

In Robertson vs. Wood, 5 Ann. 197, it was held that the receipt of a United States Receiver for price of public lands vested such title as to subject the land to judicial mortgages recorded against the holder, although the legal title remained in the United States until the patent was issued, and the holder's title was equitable merely. A similar equitable title was vested in Anderson here, to be perfected into a legal title by conveyance from his trustee, Curley, mayor.

2. That considering the pendency of proceedings to execute the foregoing mortgages, the transfer by Anderson to Ulrick was unlawful and without effect as against plaintiffs, under the express provisions of Act No. 3 of 1878, amending Art. 2453 Rev. C. C., and that although not an absolute nullity, it was null as regards them. Copes vs. Guilbeau, 34 Ann. 1032.

3. That Curley's conveyance to Ulrick, except so far as authorized by the aforesaid transfer from Anderson to Ulrick, was utterly unlawful and void: and the latter being itself avoided, the former necessarily falls with it.

The titles of Ulrick, upon which alone his rights rest, being thus destroyed, his interest in this controversy vanishes; and he being the only appellant, we have no concern with the propriety of the other relief awarded to plaintiffs.

Judgment affirmed.

No. 1228.

THE STATE OF LOUISIANA EX REL. M. S. CRAIN, DISTRICT ATTORNEY, ET AL. VS. A. W. O. HICKS ET AL.

Act No. 71 of 1882, for the purpose of increasing the number of judges in the first judicial district, clearly intended to limit the term of the new incumbent to the time of the next general election, to wit: the 22d of April, 1884.

That provision is not violative of Art. 109 of the Constitution, which fixes the term of all district judges at four years.

It is the true meaning, intent and spirit of the Constitution that general elections for district judges should occur only once every four years; and that the terms of all elective district judges should expire at the same time.

Hence, the General Assembly in increasing the number of district judges under authority of Article 110, cannot fix a term expiring at a time different from that at which expires the term of all other elective district judges in the State. Such a provision would be unconstitutional.

APPEAL from the First District Court, Parish of Caddo. *Hall*, J.

Land & Land for the Relator, Appellant.

M. S. Crain, District Attorney, for the State.

Wise & Herndon and *T. F. Bell* for Defendant and Appellee.

S. L. Taylor in pro. per.

The opinion of the Court was delivered by

POCHÉ, J. This litigation involves the question of the right to the office of one of the judges of the first judicial district. It arose out of the following circumstances:

The General Assembly, acting under authority of Article 110 of the Constitution, passed Act No. 71 of 1882, for the purpose of increasing the number of judges for that judicial district from one to two.

The act stipulated that the additional judge thus provided for should "be elected as provided by law," and an election ordered by the Governor in pursuance thereof resulted in the election of the relator, John W. Jones, on the 18th of November, 1882.

Section 3 of the act provides that the additional judge "shall hold office until the next general election for district judges, or until his successor shall be qualified according to law."

He was accordingly commissioned for "the term of said office as fixed by law."

In his proclamation for the recent general election, held throughout the State on the 22nd of April last past, the Governor included two judges for the first judicial district, and at that election S. L. Taylor and A. W. O. Hicks, defendants herein, were elected, and they have been commissioned and qualified as such.

In his petition the relator concedes the legality of the election of S. L. Taylor, who was hitherto the sole incumbent of the office of judge of the first judicial district. His suit is restricted to the defendant,

Hicks, whose election is alleged to have been unwarranted by the Constitution and not sanctioned by the laws applicable in the premises.

Relator's contention is: that on the 18th of November last, he was elected for a term of four years, which is the constitutional term of the office of district judges, and that any provision of Act No. 71, which may have warranted an election for said office at the last general election, is violative of Article 109 of the Constitution and is therefore null and void.

The defense is a general denial, coupled with the special plea that relator is estopped from questioning the legality of the election as held, by the fact of his having been a candidate before the Democratic convention for the nomination of that party as candidate for the same office at that very election.

This appeal is taken by Judge Jones from an adverse judgment rendered by the judge of the adjoining district acting in the place of the defendants, Hicks and Taylor, who recused themselves on the ground of interest.

From the foregoing statement of the pleadings and of the facts in the case, it appears that the question herein presented for solution is one of constitutional law, involving a discussion of the term of the office to which Judge Jones was elected in November last.

His main argument is, that a proper construction of sec. 3 of Act No. 71 would fix the term of his office at four years, to begin from the date of his election, and that under any other construction the section would be unconstitutional, as violative of Art. 109, which provides that district judges "shall be elected for the term of four years."

Hence, he contends that no election could be constitutionally held for that office before November, 1886. Under his construction, a special election should be ordered at that time and every four years thereafter. The same necessity would arise in the case of the additional judge for the twelfth judicial district created by operation of Act No. 22 of 1882, and of every additianal judge which the Legislature may create at its option under Article 110 of the Constitution.

Now, as the Legislature meets in the month of May only every two years, and that in one of those years there is no general election, and that in the other the general election is held in the month immediately preceding the meeting of the General Assembly, it follows that there would be as many special elections for district judges as the number of such offices which the Legislature may provide for.

A careful study of the system of Government contemplated by the Constitution, clearly demonstrates that such a frequency of elections,

and such want of uniformity in the expiration of the terms of important constitutional offices, are clashingly hostile to the ruling spirit of our organic law. The term of four years is the shortest term of all the elective offices created and provided for by the Constitution.

The true meaning and intent of that instrument, when construed under the guidance of that cardinal canon of interpretation which requires that all the parts of an instrument must be construed together, with a view to give effect to every part and to harmonize all the parts into uniformity, appears that all elective offices were to expire at the same time, and that all the incumbents should be elected at one and the same election. State *ex rel.* Shakespeare vs. Patton, 32 Ann. 1207; State *ex rel.* Railroad Company vs. Cage, 34 Ann. 509.

In order to better guard against the well recognized attendant evils of too frequent elections, the framers of the Constitution went to the extent of requiring that all parochial elections and the municipal elections of the two largest cities in the State should be held on the same day as the general election, "*and not oftener than once in four years.*" Article 192. This settled determination to avoid the dreaded recurrence of frequent elections culminated in the adoption of Article 191, which provides that "the general State elections shall be held once every four years.

This was followed by Article 262, which required that all officers whose election was provided for in the Constitution should be elected on the first Tuesday of December, 1879. And under the provisions of Article 265, the term of the officers thus elected terminated as though the election had been holden on the first Tuesday after the third Monday in April, 1880.

A proper construction of the Constitution makes it perfectly clear that the term of office of all the elective district judges in the State expired on the first Tuesday after the third Monday in April last past, and will continue to expire at the same time every four years thereafter.

We are equally clear in our conviction that the rule was intended by the framers of the organic law to apply to the term of office of judges created by the Legislature under authority of Article 110. A different ruling would effectually destroy the intended uniformity of the system, and would utterly defeat the well guarded precaution of the instrument to avoid the evil of too frequent elections.

It might with as much plausibility be argued in the sense of relator's contention that, if the Legislature were to create a new parish at its present session and order an election for representatives in said parish

in time for the next session (in 1886), that the term of office of such representatives would expire only four years after their election: and that in the future the election for the members from the parish thus created would be held at a time different from that of all other members of the General Assembly. The reverse of that proposition is the truth and is too plain for argument.

The only special elections authorized or contemplated by the Constitution are those intended to fill vacancies and that for the unexpired term of the office which may become vacant. Articles 22, 109, 160.

It is therefore clear to our minds that in creating an additional judge under the provisions of Article 110, the Legislature is powerless to fix the expiration of the term of the office at a time other than that fixed by the Constitution for the expiration of the term of office of all the elective district judges in the State.

Hence, we hold that this feature of Act No. 71, now under consideration, is so far from being violative of the Constitution, that a different provision would, on the contrary, be tainted with unconstitutionality.

But relator argues that the language of the section is liable to two constructions. It may be construed as limiting the term of the office to April, 1884—or to some future time at which a successor may be elected and qualified according to law.

He then contends that if the first limit was intended, the provision must be held as violative of Article 109. If the latter was contemplated, then the term must be held as expiring only in November, 1886.

There is absolutely no force in the argument. If the legislative intent had been to fix a term longer than until April, 1884, it would have been unconstitutional, as we have already shown. But in point of fact, no such intention can be eked out of the language of the section. The intent to limit the term "at the next general election for district judges," is manifest and unambiguous. The words "or until his successor shall be qualified," do not and cannot alter the plain meaning of the previous sentence, which remains unshaken and mandatory in the letter of its provision. The use of these words amounts to nothing more than an express mention in the act of an implied condition in the expiration of the term of all offices, resulting from Article 161 of the Constitution, which provides that "all officers shall continue to discharge the duties of their offices until their successors shall be inducted into office."

Our conclusion is, therefore, that Judge Jones had been elected for a term which expired at the last general election for district judges,

which took place on the 22d of April, 1884, and that he is now *functus officio*. In his elaborate opinion, the district judge devotes considerable time to show that the election of Judge Jones in November, 1882, was legally held, and that the Governor had ample power and authority to order the same. But the discussion of that question would throw no light on the present controversy, which restricts the issue to the legality of the defendant Hicks' election. For the purpose of this opinion, we assumed the legality of the election. Under our views of the case, we also eliminate the discussion on the plea of estoppel interposed by the defendant.

The judgment appealed from is, therefore, affirmed, at the costs of relator Jones in both courts.

No. 1212.

CRESCENT CITY ICE COMPANY VS. ABRAM ERMANN.

A litigant who fails to produce proof within his reach creates a presumption that it would be prejudicial to his case, and this presumption is strengthened when the evidence is in his possession and has been called for by his adversary by a demand upon him to produce it.

APPEAL from the Nineteenth District Court, Parish of St. Mary. *Goode*, J.

P. H. Mentz and *Foster & Suthon* for Plaintiff and Appellee.

B. F. Winchester for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The suit is for the recovery of two thousand nine hundred and fifteen dollars for ice furnished the defendant, whose defence is that he bought the ice from one Joseph Dreyfus and owes the plaintiff nothing.

The defendant is an ice dealer in Morgan City. Dreyfus was a wholesale dealer in liquors and cigars in New Orleans, was the personal friend of Ermann, and the medium through whom Ermann's drafts, cheques, etc. were collected. Ermann's funds were left with Dreyfus, and he drew on Dreyfus whenever there was occasion. Dreyfus failed in October 1883. The ice was furnished in September and October, the last shipment being on the 19th. several days before Dreyfus' failure.

Ermann's contention is that Dreyfus was his commission merchant, from whom he ordered ice and whom he paid for it by the several re-

mittances he made from time to time. There does not appear to have been any settlement of their accounts. There is nothing to shew that Dreyfus charged Ermann with these several ice-bills, and that Ermann's funds in Dreyfus' hands were thereby diminished. Dreyfus says he owes Ermann nothing on account. Ermann says "when Mr. Dreyfus failed he owed him a little amount, which has since been paid." Dreyfus swears stoutly that he alone owes the bill, but neither he nor Ermann have furnished any evidence beyond their own asseverations that they or either of them understood at the time that the one was selling ice and the other was buying it, much less is there proof that the plaintiff understood it was selling ice to Dreyfus and was looking to him for payment.

And a significant fact is that the plaintiff endeavoured to furnish such proof as would shew the contemporaneons acts of the parties, and was thwarted by the defendant. The plaintiff gave the defendant notice before the trial to produce his cheque book and the several bills of the plaintiff for the sixteen shipments of ice. If it were a fact that the Ice Co. was selling to Dreyfus, these bills would have shewn it, and would have therefore established that the plaintiff was giving credit all the time to Dreyfus alone. The defendant did not produce them, and says he made no effort to get them. The presumption is always and inevitably against a litigant who fails to furnish evidence within his reach, and it is the stronger, when the documents, writings, etc would be conclusive in establishing his case. It is a legal inference that the writings would prejudice him whenever he fails to produce them, and when too his adversary had challenged the production of them as a decisive test of their respective pretensions.

The lower court gave judgment for the full demand.

Judgment affirmed.

No. 1217.

JOSEPH JACOBS VS. DORA TOBELMAN.

The fact that a husband, who has obtained a judgment of separation from bed and board against his wife, continues to occupy the same house as his wife, but separate apartments, while he is preparing a new home to which he moves alone as soon as it is ready, will not be construed as a reconciliation under the Civil Code.

These circumstances will not bar his right to a divorce one year after the rendition of the judgment of separation.

APPEAL from the Nineteenth District Court, Parish of St. Mary. *Goode*, J.

D. Caffery for Plaintiff and Appellee.

A. C. Allen for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. This is an action for divorce predicated on a judgment of separation from bed and board, rendered at the instance of the husband more than one year previous to the institution of present suit.

The defense is an alleged reconciliation of the parties since the rendition of the judgment of separation.

The present appeal has been taken by the defendant from a judgment decreeing the divorce prayed for.

The evidence fails to sustain the defense. The proof is that, for several months after the judgment of separation, plaintiff continued to live in the former domicile of the spouses, under the same roof with his wife but in separate rooms; and that he continued to provide for the support of the wife and of the children, issue of the marriage, who had been placed in the custody of the husband.

It also appears from the evidence that plaintiff is a poor man and had no other place to live at pending his efforts to build up and reëstablish another home and a new place of business.

As soon as his new home was prepared, he moved into it and has since lived in it, separated from the defendant. As he had no other home, while he was preparing to move away, he had no other alternative but to continue to dwell under the same roof with his wife, or to expel her from that house. The course which he adopted was doubtless dictated by feelings of humanity which courts of justice should encourage rather than discountenance.

These facts do not constitute in our opinion a reconciliation within the meaning of our Code. Hence, we conclude with the district judge, that plaintiff was entitled to a decree of divorce *a vinculo matrimonii*.

Judgment affirmed.

No. 1214.

JEAN GERAC ET AL. VS. U. A. GUILBEAU ET ALS.

Where a party is in possession under a tax title, *prima facie* valid, a seizure cannot be legally made of the property by other parties enforcing claims against former owners. A direct action must first be resorted to to annul the title.

Where a new trial has been prayed as to certain specified parts or features of a judgment; has been granted, had, and another judgment rendered as to such parts, the judgment so far as uncomplained of will not be reviewed in this Court.

Gerac vs. Guilbeau.

APPEAL from the Twenty-first District Court, Parish of St. Martin. *Fontelieu*, J.

Edward Simon and *C. H. Mouton* for Plaintiffs and Appellees.

F. Voorhies for Defendants and Appellants.

The opinion of the court was delivered by

MANNING, J. The plaintiffs, claiming to be owners of certain lands, injoin the sale of them under the foreclosure of a mortgage given by a former owner after the divestiture of her title.

The lands belonged to Ann Offutt. In 1873 they were sold for taxes, the State becoming the adjudicatee, and in 1881 the plaintiffs bought at a sale by public auction provoked by the State. Both these deeds were recorded. In 1879, several years after the deed to the State had been recorded, Mrs. Offutt mortgaged the lands to Anderson, and her mortgage note was transferred to a mercantile firm who are the seizing creditors in this instance, and co-defendants with the sheriff.

The plaintiffs had possession under their deed when the seizure was made, and they invoke the protection of that rule which requires a party to proceed by direct action to annul a *prima facie* valid title, and forbids him seizing in disregard of such title.

This principle has been maintained in a series of decisions and may be considered too well settled to be now called in question. Coco v. Thienman, 25 Ann. 236; Lannes v. Work. Bank, 29 Ann. 112; Jurey v. Allison, 30 Ann. 1234; Ludeling v. McGuire, 35 Ann. 893.

The judgment of the lower court was in accordance with this jurisprudence.

The plaintiffs had prayed in their petition for damages, by way of attorneys fees, for the expense they were driven to in obtaining the injunction. The lower judge perpetuated the injunction, but rejected the demand for damages. The plaintiffs have not filed any prayer for amendment of the judgment. The mention of the matter in their brief does not suffice.

Judgment affirmed.

ON REHEARING.

The land is described in the seizure and advertisement as lots 1—14 inclusive of sec. 28 of a designated township. On the first trial below the judge perpetuated the injunction in Feb. 1883 without reservation. The defendants prayed a new trial on the ground that the tax title does

not include lot No. 1. and that "the same might be said of lots 2 and 3." The new trial prayed was restricted by the defendants themselves to "the property described in their motion," and was granted accordingly. It was had in Feb. 1884, and the judgment maintained that rendered in 1883 except as to lot No. 1, as to which the injunction was dissolved. That is the judgment we affirmed.

The defendants on rehearing urge upon us to except lots 2 and 3, which they falteringly suggested "might be" in the same condition as lot No. 1, and also lots 6 and 8. We cannot touch the judgment of 1883 as to these two last lots. It is true that both of them as well as Nos. 2 and 3 are not included in the tax sale. Therefore

It is ordered and adjudged that our decree and the judgment of the lower court be amended by dissolving the injunction as to lots Nos. 2 and 3 of the section designated, and as thus amended that it be the judgment of this Court, the plaintiffs paying the costs of this appeal.

No. 1220.

BELONIE GRANGER, ADM'R, vs. JOSEPH S. REID, ADM'R.

The second administrator of a succession who sues the succession of the first administrator of the same succession for a moneyed judgment for funds alleged to have been received by said administrator and unaccounted, will be successfully met by an exception of no cause of action. His suit should be for an account and not for a moneyed judgment.

APPEAL from the Fourteenth District Court, Parish of Calcasieu. *Read*, J.

G. A. Fournet and *F. A. Gallaugher* for Plaintiff and Appellant.

Geo. H. Wells for Defendant and Appellee.

MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. The motion to dismiss this appeal is predicated on an alleged deficient bond of appeal. The bond is in favor of "Thaddeus Mayo, clerk district court," etc., and appellee contends that the description is fatally defective.

The body of the bond contains the statement that the appeal is taken from the District Court of the Parish of Calcasieu, and it thus informs the reader that the bond is in favor of Thaddeus Mayo, clerk of the District Court of the Parish of Calcasieu. A similar bond was held good

by our immediate predecessors in the case of Eschert vs. Harrison, 29 Ann. 860. With them we deprecate and must discourage "this careless and slipshod way of preparing legal papers," but like them we hold the informality is not sufficient to defeat the appellant in his constitutional right of appeal.

The motion to dismiss is, therefore, denied.

ON THE MERITS.

Plaintiff, as the second administrator of the succession of Emerand Benoist, seeks to recover a moneyed judgment against the succession of David John Reid, who was the first administrator of the Benoist succession, for funds alleged to have been received by D. J. Reid during his administration and not accounted for.

The defense was an exception, containing among other grounds that of no cause of action. The exception was sustained and the plaintiff appeals.

The substantial allegations of the petition are that the first administrator, Reid, caused a sale of the succession property to be made on terms—part in cash and on credit—the proceeds of which sale he "collected or ought to have collected and realized," and that he disposed of other property of the succession alleged to be worth a specific amount, for which he is responsible; that out of the funds thus realized he has paid over to the heirs of Benoist the sum of eight hundred and thirty-five dollars, by means of purchases made by said heirs at the succession sale, and that he died without having accounted for the balance of the succession property.

The striking feature of the pleadings is that the defendant succession is to be credited in the sum of $835 to the debit of certain heirs of Benoist, but the names and the number of such heirs is not given, and of course they are not parties to the suit. Hence, they could not be bound by the judgment prayed for, and therefore such a judgment could be no bar to an action by these heirs against the succession of Reid for that very amount. This consideration fairly illustrates the wisdom of the rule of jurisprudence which prescribes that in such cases the action should not be for a moneyed judgment against the unfaithful administrator, but it should be for an account.

In such a proceeding all proper and necessary parties could be brought before the court, and the judgment would be final and binding on all parties in interest. Thomas, adm'r, vs. Bourgeat, ex, 1 Rob. 4; Succession of L. A. Rachal, 12 Ann. 717.

The wisdom of the rule is further illustrated by the fact that in his petition plaintiff does not, as he could not, allege that Reid had received a definite amount of succession funds, but his allegation is qualified by the significant averment that a specific amount was due and that the administrator ought to have collected the same. We note also that plaintiff does not allege that the sum of $835 is the only credit to which the former administrator is entitled, but he specially anticipates that he may be entitled to further credits and reserves his right therefor.

It is therefore clear to our minds that all the allegations of plaintiff's petition, even taken as true, could not justify a moneyed judgment for any specific amount against the succession of David J. Reid, but that they could at most justify an action for an account, by means of which the matters vaguely alleged could be adjusted with legal certainty.

The exception was, therefore, properly taken and correctly sustained.

Judgment affirmed.

No. 1219.

JAMES A. BLANC, ADM'R, ET AL. VS. LASTIE DUPRÉ ET AL.

Where one appointed as a curator of a vacant succession has brought suit in that capacity to recover from third possessors land belonging to the succession, citation in such suit will operate as an interruption of prescription in favor of the true heirs and representatives, although the appointment of a curator was a nullity. It is sufficient that the defendants had been seasonably notified by judicial demand and citation of the titles which are the foundation of the demand.

The transfer by parties of their rights in property involved in such a suit, to a third person, provided the suit itself is not discontinued or abandoned, is not such an abandonment as will defeat the interruption by citation, in their favor, upon the reversion to them of the rights so transferred.

APPEAL from the Thirteenth District Court, Parish of St. Landry. *Hudspeth*, J.

Perrodin & DuRoy for Plaintiffs and Appellees.

Lewis & Bro., *K. Ballio* and *H. L. Garland* for Defendants and Appellants.

The opinion of the Court was delivered by

FENNER, J. Prior to the year 1818, Antoine Blanc died in St. Landry parish, leaving a large tract of land in said parish, which is the subject of the present litigation. On June 20, 1819, the brother of the deceased, Louis Blanc, accepted the succession, as sole heir, with benefit of inventory, which acceptance was duly recorded. On June 21, 1819, an esti-

mative inventory of the succession was taken. By due proceedings the land was sold at public offering in the same year, on terms of credit, to Mace and Guilleland. Mace being unable to pay the price, retroceded his undivided share to Louis Blanc, by act duly recorded. Guilleland, failing to pay, Louis Blanc obtained judgment against him, seized, sold and became the purchaser of his share of the land.

By the effect of these proceedings, Louis Blanc became in 1821 the sole and undisputed owner of the land, under valid titles duly recorded.

Notwithstanding this condition of affairs, and probably in ignorance of them, the succession of Antoine Blanc was reopened in this parish in 1868, Elbert Gantt was appointed administrator thereof, the land in controversy was inventoried as belonging to his succession, and, in due course of probate proceedings, it was sold and adjudicated to Jas. K. Dixon, under whose title thus derived the present defendants hold the land.

This is a petitory action brought by the administrator and heirs of Louis Blanc to recover the land.

The title of Dixon, under whom defendants hold. dates from January 11, 1870.

The instant suit was only filed in February 1882.

Two propositions may be laid down, at the threshold, as irrefragable:

1. That the sale under which defendants hold, being the sale of the property of another, was null.

2. That, nevertheless, the title of defendants being just and translative of property, peaceable and uninterrupted possession thereunder in good faith for ten years would perfect their title by prescription.

It thus became incumbent on plaintiffs to establish an interruption of prescription. To meet this exigency, plaintiffs rely upon citation of defendants made in 1879, in a suit entitled C. C. Duson, curator, vs. Lastie Dupré and others, which was twice before this Court. See 32 Ann. 896; 33 Ann. 1131.

The succession of Louis Blanc had been opened in this parish as a vacant estate and C. C. Duson had been appointed and qualified as curator thereof. In that capacity he brought the suit referred to against the same defendants and upon the identical cause of action presented in the present action.

To the effect of this citation, as interruptive of prescription, it is first objected that Duson, curator, did not represent the succession of Louis Blanc or his heirs, for the reason that his appointment was a nullity on two grounds:

1. That Louis Blanc having died in the parish of Orleans, where he resided, the probate court of St. Landry had no jurisdiction over his succession.

2. That Louis Blanc having left heirs residing in the State, the succession was not vacant and the court was without power to deal with it as such.

By reference to 32 Ann. 886, it will be seen that these very objections were urged to Duson's capacity in that suit, and were overruled on the ground that the nullity of Duson's appointment was not apparent on the face of the pleadings, and capacity could not be questioned collaterally.

Defendants say, however, that in the instant case the facts upon which the nullity rests are apparent on the face of plaintiffs' own pleadings and, therefore, may be noticed by the Court.

We will not discuss this question. Conceding the nullity of Duson's appointment as curator, we still think his suit, in that capacity, sufficed to interrupt prescription. He acted as the representative of the succession of Louis Blanc under an appointment by a court for that purpose. Had he recovered the property, his recovery would have inured to the benefit of the succession of Louis Blanc or of those entitled thereto, whoever they might be. The literal terms of Art. 3518 C. C. were complied with, viz: "A legal interruption takes place when the possessor has been cited to appear before a court of justice either on account of the ownership or of the possession." The defendants were cited to appear before a court on account of ownership asserted in behalf of the succession of Louis Blanc by one claiming to represent that succession under judicial appointment *prima facie* valid, and we think the plaintiffs are entitled to the benefits of the interruption, as they would have been entitled to the fruits of the recovery had it taken place. The case falls clearly within the broad doctrine heretofore laid down by this Court: "In order to determine the extent and effect of a legal interruption, we must inquire more particularly into the object and cause of the action than into *the right of the plaintiff*, the manner in which it is prosecuted and the competency of the court in which it is instituted, and endeavor to ascertain how far *the knowledge of the titles on which the action is founded* has been brought home to the defendant by the judicial demand; and we do not hesitate to conclude that, if it be established that the defendant has been judicially notified of the titles which are the foundation of the demand, so as to acquire a sufficient knowledge of the rights which are sought to be enforced against

him by a suit, there results from said suit a legal interruption *in favor of those to whom such rights belong.*" Flower vs. O'Connor, 17 La. 219.

It is next contended that even if the citation in that suit was effective in favor of plaintiffs as an interruption of prescription, its effect was lost by reason of plaintiffs' *abandonment* of the suit under Art. 3519 C. C. which declares: "If the plaintiff in this case, after having made his demand, abandons or discontinues it, the interruption shall be considered as never having happened."

The abandonment is claimed as the effect of the transfer by plaintiffs of all their rights, claims, etc., in the land in controversy to C. C. Duson, made during the pendency of the suit. This transfer was the subject of discussion in the decision rendered in 33 Ann. 1131, where it was annulled as the transfer of a litigious right and the suit, in consequence, dismissed, with express reservation, however, "of the rights of the succession of Louis Blanc or his heirs to vindicate their alleged titles to these lands by proper proceedings."

There was no discontinuance and no abandonment of the suit. On the contrary, the suit proceeded to final judgment and was dismissed, without prejudice to plaintiffs' rights, as we have seen.

Whatever abandonment there was of plaintiffs' rights in the subject-matter of the suit was an abandonment, not in favor of defendants, but in favor of Duson, and defendants can take no advantage from it. It was the obvious purpose of both plaintiffs and Duson in the transfer that the rights of the former to the land and the suit for the enforcement thereof should not be abandoned, but, on the contrary, should be prosecuted; as is evident from the provision in the transfer that plaintiffs should receive the stipulated price only in the event of Duson's recovery of the land. As affecting the question of interruption, it could make no difference whether the suit was prosecuted for the benefit of plaintiffs or of their transferee, Duson. We can find no force in the claim of abandonment, and must hold that the prescription invoked by defendants suffered a legal interruption and the plea must, therefore, be overruled.

On the merits, there is no defense.

The several bills of exception to the reception of evidence are without merit.

The identity of the land claimed by plaintiffs with that held by defendants is apparent from the fact that both claim from the same author and by descriptions substantially identical.

Judgment affirmed.

No. 1227.

SUCCESSION OF S. J. WELDON—ON OPPOSITION OF J. L. MORRIS.

Interest on moneys of the wife received and expended by the husband can be allowed only from his death, when the claim is set up against his succession.

In a suit for revival of a judgment, citation within ten years interrupts prescription. If the judgment rendered thereon does not specifically revive the judgment, that error may be corrected by proper proceedings below.

APPEAL from the Thirteenth District Court, Parish of St. Landry. ——, judge *ad hoc*.

H. L. Garland for the Opponent, Appellant.

K. Baillio, contra.

ON MOTION OF ADMINISTRATOR TO DISMISS.

The opinion of the Court was delivered by

MANNING, J. The motion is based on an alleged want of jurisdiction, it being assumed that the sum involved is $494. That is the question in dispute, the inventoried value of the succession being claimed by the opponent to be $14,353, and the judge finding it to be $2,550. Clearly the motion is untenable and must be denied.

ON THE MERITS.

Weldon died on May 2, 1863 and his widow qualified as administratrix. The inventory then taken represented values in Confederate currency. The movables were unavoidably lost through the accidents of war.

Morris obtained judgment against the succession in January 1871 for $550. In 1882 the succession was not yet settled, and the administratrix had a new inventory taken, the sum total being $494. She proposes to distribute that sum, and the judgment creditor opposes. The judge *ad hoc* relieved the administratrix from accounting for property unavoidably lost, compensated the revenues by expenses of various kinds, and reduced the estimated value of the land which was $8,500 in Confederate currency to $2,550, the rate being 30 cents in the dollar.

The administratrix interposes in this Court the plea of prescription to the judgment of the opponent. Ten years from its rendition would have elapsed in January 1881. He instituted his action for revival and had citation served the preceding month, but the judgment rendered thereon is not for revival. It seems to be a judgment for a sum of

money. That had already been obtained. The only object of the subsequent suit was to revive the first judgment, and the revival of it is not even mentioned. It should have been specifically decreed.

It does not follow however that his suit is therefore prescribed. The citation was in time. That has interrupted prescription. The opponent may obtain a judgment for revival on that citation. He is not therefore without interest, and the plea cannot at present be maintained.

The lower court erred in allowing interest on the claim for paraphernal funds from the time they were received by the husband. The proper date is his death. In other respects he has ruled correctly, save in classifying Morris as a judgment creditor absolutely. It may be that on the trial of the suit for revival, payment may be pleaded and proved. He must obtain his judgment for revival at his peril.

It is therefore ordered and decreed that the tableau and account are amended by inserting May 2, 1863 as the date from which interest runs on the widow's paraphernal claim, that the classification of Morris as a judgment creditor be provisionally suspended, and that in other respects the judgment be affirmed, the parties to pay the costs of appeal equally.

No. 1213.

The State of Louisiana vs. Berry Johnson.

The legal discretion of the trial judge in a criminal case, in matters of continuances, will not be interfered with unless the ruling complained of is glaringly erroneous and manifestly unjust.

An accused who, on the day of his arraignment, declines the offer of the court to assign counsel for his defense and informs the judge that he has retained his own counsel, is not entitled to a continuance on the ground that his counsel subsequently abandoned his case, when it appears that counsel was then assigned to him by the court and defended him through the trial and on appeal.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

M. S. Crain for the State, Appellee.

The opinion of the Court was delivered by

Poché, J. The defendant appeals from a sentence of death for the murder of his wife and seeks relief under three bills of exception.

1. He complains of the refusal of the continuance of his case prayed for, on the ground that he had not had sufficient time to prepare his defense.

It appears that when he was arraigned, one week previous to his trial, the court offered to assign counsel for his defense. The offer was declined, for the reason that he had secured counsel of his own. On the day of trial he informed the court that his counsel had abandoned him, and he therefore prayed for a continuance on that ground. Whereupon, the court having assigned him counsel who now represents him, refused the continuance, but allowed two hours delay to the attorney thus appointed.

At the time that the accused was offered counsel by the court, he was particularly warned to be in readiness for trial on the day fixed. All these circumstances satisfy us that in refusing the continuance of the cause, the judge did no injustice to the accused, and that he properly exercised the discretion vested in him by law in matters of continuance.

Our jurisprudence has firmly settled the rule that this Court will not interfere with the legal discretion of the trial judge, unless gross injustice has been done to the accused. The defendant chose to rely on his own selection of counsel rather than to accept the guidance of the court and he must abide the consequences. And besides, it appears that he was finally assisted by zealous counsel, who has invoked every technical defense which legal ingenuity can suggest.

2. The second bill of exception presents the ruling of the judge, in admitting testimony to show the previous relations as to peace or general treatment between the accused and his wife, whom he was charged to have murdered.

The evidence was clearly admissible, in order to show the *animus* which prompted the accused in the perpetration of the homicide.

Circumstances resulting from such evidence may contribute to characterize the very essence of the deed, and law and justice alike demand the introduction of testimony on such a vital point.

3. The court admitted in evidence a certain rifle, over the objection of counsel for the accused.

Nothing in the record shows the reason or object of that evidence, or the connection between the rifle and the charge. We are therefore deprived of all means to consider the question of the relevancy of that kind of evidence. In the bill the judge says that the evidence was relevant, as tending to show premeditation. The defendant has failed to supply any reasons or to show any circumstances or authority to the contrary, or to show how the accused could possibly have been injured by the exhibition of a rifle to the jury, without any testimony or effort to show that the rifle belonged to the accused, or had been used by him at any time or under any circumstance.

The bill is painfully vague and unsatisfactory on this point, but we cannot do the injustice to presume that the trial judge would have tolerated the idle ceremony of exhibiting in a solemn trial a rifle or any other weapon or thing which had no connection by ownership or otherwise with the accused or the crime charged against him. It is the legal duty of parties who seek the reversal of rulings of inferior courts, to present to the appellate tribunal an intelligible statement of the matters embraced in their complaint.

We find no error to the prejudice of the accused.

Judgment affirmed.

No. 1215.

THE STATE OF LOUISIANA vs. WILLIE WILLIAMS, ALIAS "FRENCHY."

Mere absence of a witness, however material, is not ground for a continuance, unless it appears that due diligence had been used, and also that there was just expectation of being able to procure the attendance of the witness in case the continuance were granted.

APPEAL from the Nineteenth District Court, Parish of St. Mary. *Goode*, J.

John N. Ogden, District Attorney, and *B. F. Winchester* for the State, Appellee.

A. C. Allen and *P. P. Sigur* for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The only error assigned is the refusal of a continuance applied for on the ground of absence of a material witness.

The affidavit for the continuance was defective in not showing that there was any expectation of being able to procure the absent witness. State vs. Mollie Robinson, 29 Ann. 364.

Defendant had given timely order for the summons of the witness, but the summons had been duly issued and returned "not found," four days before the trial. If the defendant, in his order, indicated the place of residence of the witness, it is to be presumed that the sheriff sought for him at that place, without finding him, and there is nothing to show the contrary. If, knowing where he was to be found, he did not indicate it in his order, that was lack of diligence.

Although the judge *a quo* refused the application for continuance for the defect above stated, yet, in his anxiety to protect defendant, he caused the sheriff to send for the witness to a place suggested at the

time as the place of his then residence; and before the defendant's evidence was opened, the sheriff made return that he had proceeded to that place and that the witness could not be found.

Nothing in the affidavit or record indicates that, if a continuance had been granted, the witness could have been produced.

Judgment affirmed.

No. 1226.

THE STATE EX REL. FRANK M. CONDON VS. C. C. DUSON, SHERIFF.

A party in actual custody under a charge of manslaughter, a bailable offense, is entitled to proceed by writ of *habeas corpus* before the Supreme Court or any of its judges for the purpose of being admitted to bail, provided he show that the judge of the district court of the parish in which he is held is absent from the State.

APPLICATION for *Habeas Corpus*.

H. L. Garland and *Perrodin & DuRoy* for the Relator.

John N. Ogden, District Attorney, for the Respondent.

The opinion of the Court was delivered by

POCHÉ, J. The relator, who is in the custody of the sheriff, has applied for a writ of *habeas corpus*, for the purpose of being admitted to bail.

He shows that the charge under which he is held, that of manslaughter, is a bailable offense, and that the judge of the District Court of the Parish of St. Landry, the only court of competent criminal jurisdiction, is now absent from the State. Hence, he alleges that his only remedy for the enforcement of his constitutional right of bail is by means of an application to the judges of this Court.

Resisting the application, the district attorney contends that the proceeding is really and in truth a simple application for bail, and that this Court has no legal authority to entertain the same.

The punishment provided for the offense charged against relator places his case within the appellate jurisdiction of this Court. Article 89 of the Constitution vests the power in this Court and in each of its judges to issue writs of *habeas corpus* in cases in which it may have appellate jurisdiction. Article 792 of the Code of Practice confers the same power to district judges within the limits of their respective jurisdiction. Article 793 of the same Code provides that in case of the ab-

sence of the district judge the writ may be issued by the judge of competent jurisdiction in one of the adjoining districts.

It is plain, by a comparison of these articles and of the constitutional mandate, that touching such a case this Court or any of its judges would have at least the same power and authority as any judge of an adjoining district.

Undoubtedly, in ordinary circumstances such applications should originate in the court of competent original jurisdiction, but the rule must yield in the face of an unavoidable exception. In this case, the absence of the district judge creates an absolute impossibility to present the application to him. Our refusal to grant him relief when this Court is holding a term in the parish where the case is pending, would leave a party in actual custody under a charge or offense which is bailable in its nature and which is within our appellate jurisdiction. The great and primary object of the writ of *habeas corpus* is to afford judicial relief to parties who are illegally deprived of their liberty. The peculiar and exceptional circumstances of this case place the relator in that precise condition. Our duty is to come to his relief, and we have ample authority to give the necessary orders.

In the case of Longworth, 7 Ann. 247, this Court held that "a judge or court authorized to issue a writ of *habeas corpus* cannot refuse bail, by sufficient securities, except for capital offenses." It is the constitutional right of the prisoner to demand it, and it is not in the discretion of the judge to deny it.

The same doctrine was announced in the case of the State vs. Roger, 7 Ann. 382. See, also, Governor vs. Fay, 8 Ann. 490.

It is to be understood that nothing in this opinion must be construed as forestalling the subsequent action of any competent authority to find or prefer a charge of greater gravity against this relator. Our action is based exclusively on the nature of the sole charge now pending against him and under which he is entitled to bail.

It is therefore ordered that the sheriff do release the prisoner on a bond with good and solvent securities, in the sum of five thousand dollars, conditioned for his appearance before the competent authority to answer to the charge preferred against him.

No. 1211.

THE STATE OF LOUISIANA VS. WILLIAM FOSTER AND ROBERT DAVIS.

In a murder case, a verdict of "guilty of capital punishment" cannot serve as a foundation for a sentence of death. The verdict, taken literally, convicts the accused of no crime known to the law or charged in the indictment; and if we resort to conjecture as to its true intent, the arguments are equally balanced as to whether it meant "guilty *with* capital punishment," or "guilty *without* capital punishment."

APPEAL from the Twenty-first District Court, Parish of Iberia. *Fontelieu*, J.

C. H. Mouton and *John N. Ogden*, District Attorneys, for the State, Appellee.

Breaux & Renodet for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The defendants appeal from a sentence of death for the crime of murder.

A brief extract from the minutes of the court, as presented in the record, will disclose the only point which we find it necessary to discuss on this appeal:

"The jury appeared in court, and on being polled each juror answered to his name, as follows, etc.; whereupon James Camorse, foreman, handed to his Honor, the judge, the verdict in this case. The court ordered the clerk to read the verdict. It read as follows: 'Both guilty of capital punishment, (Signed) Jas. Camorse, foreman.' The court again ordered the jury polled, and as each juror was called his Honor, the judge, asked him, 'What is your verdict?' Each juror answered, 'Both guilty of capital punishment.' The court then, on motion of the district attorney, ordered the verdict of 'Both guilty of capital punishment' recorded and remanded the prisoners to jail, and the jury in this case was discharged."

An imagination stimulated by familiarity with the freaks of ignorant juries might have conceived the possible existence of a single man capable of inditing such a verdict; but the phenomenon of twelve men successively adopting and repeating the senseless formula, confounds all precedent and would surpass belief if it were not asseverated from the pages of a solemn judicial transcript. Not the slightest effort seems to have been made to call the attention of the jury to the absurdity of their verdict, or to afford opportunity for correction or explanation.

The sentence of death passed upon the prisoners in pursuance of such a verdict cannot, of course, be sustained. However heinous be the guilt of defendants, without the verdict of a jury finding them guilty of some capital crime, the judge had no more right to touch their lives than if they had been as innocent as saints. We are equally without right to affirm his sentence, unless such verdict exists and appears on the face of the record. Obviously, it is wanting here. The verdict, taken in a literal sense, convicts the accused of no offense known to the law or charged in the indictment. If we resort to conjecture as to the intention of the jury, the arguments are about equally balanced as to whether it intended to find "guilty *with* capital punishment," or "guilty without capital punishment." In support of the latter hypothesis the record discloses that, on their *voir dire*, two of the jurors expressed their aversion to capital punishment.

In such matters we must not depend upon uncertain conjectures; and we are bound to reverse the judgment.

It is, therefore, ordered, adjudged and decreed that the verdict of the jury be annulled and set aside, the judgment and sentence voided and reversed, and the case remanded to the lower court to be there proceeded with according to law.